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TAN SRI ABDUL KHALID IBRAHIM

v.

BANK ISLAM MALAYSIA BHD

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: D4-22A-216-2007]
2 DECEMBER 2011

C

BANKING: *Banks and banking business - Islamic banking - Bai Bithaman Ajil Facility - Facility and transactions thereunder alleged to have contravened Islam and Syariah Principles - Whether Court required to refer Syariah issues to Syariah Advisory Council (SAC) Bank Negara Malaysia for ruling - Whether ss. 56 & 57 of Central Bank of Malaysia Act 2009 had retrospective effect - Whether they negated defendant's substantive right to lead expert evidence on Syariah issues*

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Bank Islam Malaysia Berhad ('Bank Islam') filed a debt recovery action against Tan Sri Abdul Khalid bin Ibrahim ('Khalid') based on a Bai Bithaman Ajil facility ('BBA Facility') executed between the parties. In an earlier suit against Bank Islam, Khalid alleged the bank had acted in defiance of a collateral contract between the parties in terminating the BBA Facility. In its suit, Bank Islam had obtained summary judgment against Khalid but the Court of Appeal set it aside and ordered a trial as the views of experts concerning the Islamic financing facility conflicted. When resisting the summary judgment application, as well as in his statement of defence, Khalid had challenged the validity of the BBA Facility agreements and the legality of Bank Islam's sale of certain pledged shares as being contrary to Islam and/or Syariah principles. Bank Islam then applied (*vide* encl. 59) under s. 56 of the Central Bank of Malaysia Act 2009 ('CBMA') for the court to refer certain Syariah questions to the Syariah Advisory Council of Bank Negara Malaysia ('SAC') for its ruling. Khalid objected to encl. 59, *inter alia*, on the ground (i) the court had previously made such a reference to the SAC at the summary judgment stage and was now estopped from repeating the procedure and (ii) that besides contravening the Federal Constitution, ss. 56 and 57 of CBMA came into effect after the instant actions were filed and thus they could not operate retrospectively to negate his substantive right to call expert witnesses to testify on matters involving Syariah or Islamic law.

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Held (allowing encl 59 with costs):

(1) Sections 56 and 57 of the CBMA were procedural in nature. There was no adverse impairment of any pre-existing substantive right of Tan Sri Khalid. It entailed nothing more than the application of a new procedure as far as Syariah issues were concerned; the only difference being that as from 25 November 2009, the court's discretionary power, that existed under s 16B (8) of the repealed Central Bank Act 1958, was taken away and the ruling of the SAC was binding on the Court. (paras 36 & 43)

(2) The proposition that Tan Sri Khalid had a vested right to lead expert evidence was untenable because the SAC was a statute-appointed expert tasked with ascertaining Islamic law for Islamic financial business since the amendment to the Central Bank Malaysia Act 1958 in 2003, well before the instant action was brought before the court. (para 44)

(3) Sections 56 and 57 of CBMA were valid federal laws enacted by Parliament pursuant to Item 4(k) of the Federal List (List I) in the Ninth Schedule of the Federal Constitution. Should there be any question concerning a Syariah matter, the Court had to invoke s. 56 (para 45)

(4) The letter from the court to the SAC at the summary judgment stage merely enquired if there was any existing resolution passed by SAC in respect of BBA contracts. It was not a reference to SAC for a ruling on a Syariah issue. (paras 28-29)

(5) The SAC did not perform a judicial or quasi-judicial function. Its function was confined to the ascertainment of Islamic law on a financial matter. The court still had to decide the ultimate issues which had been pleaded. (para 45)

Case(s) referred to:

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Bank Shamil of Bahrain v. Beximco Phamaceutical Ltd & Others [2004] All ER (D) 280 ***(refd)***

Curtis v. Johannesburg Municipality 1906 TS 308 ***(refd)***

Gerald Fernandez v. Attorney-General, Malaysia [1970] 1 LNS 27 FC ***(refd)***

Goopan Govindasamy v. A Subramaniam & Anor [1980] 1 LNS 22 FC ***(refd)***

Haw Tua Tau v. PP [1978] 1 LNS 60 HC ***(refd)***
Howard Smith Paper Mill Ltd et al v. The Queen [1957] SCR 403 ***(refd)***
Keith Sellar v. Lee Kwang and Tennakon v. Lee Kwang [1980] 1 LNS 36 FC ***(refd)***
Khajah Husain 'Ali v Shazadih Hazari Begum, 12 WR ***(refd)***
L'Office Cherifien des phosphates v. Yamashita-Shinnihon Steamhip Co Ltd [1994] 1 AC 486 ***(refd)***
Lee Chow Meng v. PP [1978] 1 LNS 88 FC ***(refd)***
Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 SC ***(refd)***
Lim Sing Hiaw v. PP [1964] 1 LNS 92 FC ***(refd)***
Maxwell v. Murphy [1957] HCA 7 ***(refd)***
Newell v. The King [1936] HCA 50 ***(refd)***
Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case [2010] 4 CLJ 388 HC ***(refd)***
Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals [2004] 2 CLJ 617 CA ***(refd)***
Yew Bon Tew v. Kenderaan Bas Mara [1983] AC 553 ***(refd)***

Legislation referred to:
Central Bank of Malaysia Act 1958 (repealed), s. 16B(8)
Central Bank of Malaysia Act 2009, ss. 56(1)(b), 57
Federal Constitution, arts. 8, 74 part ix

Other source(s) referred to:
Engku Rabiah Adawiah Engku Ali, *Constraints and Opportunities in Harmonization of Civil Law and Shariah in the Islamic Financial Services Industry* [2008] 4 MLJ i
Islamic Banking: Perspective on Recent Case Development [2009] 1 MLJ xci

For the plaintiff - Malik Imtiaz (Mathew Philips, Asma Mohd Yunus, Azinuddin Karim & Janine Gill with him); M/s Thomas Philip
For the defendant - Alan Adrian Gomez (Ganesan Nethi with him); M/s Tommy Thomas

Reported by Ashok Kumar

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This is my judgment in respect of the defendant's application ("encl. 59") pursuant to s. 56 of the Central Bank of Malaysia Act, 2009 ("Act 701") to refer certain questions to the Shariah Advisory Council of Bank Negara Malaysia ("SAC").

[2] I have heard learned counsels for the parties, perused the application and other relevant documents and considered the written submissions filed herein. I made an order allowing the reference and fixed 1 December 2011 for the parties to appear before the court to assist the court in formulating the questions to be referred to SAC. By agreement of the parties, the court decided to refer the following questions to SAC:

(i) Whether, pursuant to the terms of the BBA Facility Agreements, the mode of execution of Asset Sale Agreements and Purchase Agreements by the defendant ("Bank Islam") and the plaintiff ("Tan Sri Khalid") at six monthly intervals, is contrary to the principles of Shariah;

(ii) Whether it is a requirement under Shariah law for Bank Islam, after having declared a default of the terms of the BBA Facility Agreements to obtain Khalid's consent prior to the disposal of the shares pledged by him as security under the said agreements;

(iii) In the event that the BBA Facility Agreements are found to be contrary to the principles of Shariah, what would be obligations of the parties?;

(iv) (a) Whether it is the opinion of the Shafie Madzhab that there must be two distinct and separate contracts/ transactions between the first and the second sale in Bai-Inah transactions;

(b) If so, whether in light of the, *inter alia*, paras. D & E of the recital and art. 2.3.1, 2.3.2 and 3.1 (a) of the Master Revolving Al-Bai Bithaman Ajil Agreement dated 30 April 2001 ("BBA Facility") and/or the fact that the BBA Facility is a restructuring of earlier Murabahah Agreements, whether the qualification referred has been violated?; and

(v) Whether, in the circumstances of this case, the Revolving element of the BBA Facility is tantamount to multiple contracts on the same subject matter ie, the Kumpulan Guthrie shares, and it so, whether it is contrary to the Shariah principles and the BNM SAC Resolution No. 131. (hereinafter referred to as "Shariah Issues")

[3] For clarity and convenience sake, I will refer the plaintiff as Tan Sri Khalid and the defendant as Bank Islam.

A **Background Facts**

[4] Compendiously and concisely, the relevant facts necessary and germane to the disposal of this application run as under:

B (i) Suit 22A-216-2007 ("Suit 216") was filed by Tan Sri Khalid on 18 May 2007. The essence of the complaint by Tan Sri Khalid is that Bank Islam had acted in defiance of a collateral contract between the parties in having terminated the Bai Bithaman Ajil Facility entered between them on 30 April 2001 ("the BBA Facility");

C (ii) Suit 22A-227-2007 ("Suit 227") was filed by Bank Islam on 24 May 2007. It is in essence a debt recovery action premised upon the BBA Facility;

D (iii) The two suits were consolidated on 15 May 2008;

(iv) Bank Islam applied for summary judgment in respect of Suit 227 on 17 July 2007 ("the summary judgment application"). In resisting the application, Tan Sri Khalid, *inter alia*, challenged the validity of the BBA Facility Agreements and the legality of the sale of the pledged shares by Bank Islam, *inter alia*, for want of compliance with religion of Islam and/ or the principles of Shariah. The same were also pleaded in his statement of defence;

F (v) My learned sister, Rohana Yusuf J, on 21 August 2009, had allowed the summary judgment application; (See *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case* [2010] 4 CLJ 388).

G (vi) Tan Sri Khalid appealed the decision to the Court of Appeal *vide* Civil Appeal W-02 (IM)-1828-09. In allowing the appeal on 3 March 2009, the Court of Appeal stated in its brief grounds that in view of the conflict of views of the experts, the matter ought to proceed to full blown trial;

H (vii) The trial of this action had been proceeded with two witnesses until on 1 January 2010, where my learned sister Rohana Yusuf J, was recused by an order of the Court of Appeal; and

I (viii) This action was then case managed before my learned sister, Has Zanah binti Mehat J and subsequently myself until to date. Further trial dates were fixed but on 13 June 2011, Bank Islam filed encl. 59.

Grounds Of Enclosure 59

[5] The grounds of the application, as set out in the affidavit affirmed by Ganesan a/l Nethiganantarajah on 13 June 2011, were in substance twofold: first, that there were Shariah Issues put forth by Tan Sri Khalid to be decided by this court and, second, s. 56 of Act 701 imposes such issues to be referred to SAC in which any ruling made shall be binding on this court by virtue of s. 57 of Act 701.

Grounds Of Objection

[6] In response, Tan Sri Khalid objected to encl. 59 on the grounds that: (i) there had been a prior reference to SAC by my learned friend, Rohana Yusuf J, at the summary judgment stage; (ii) s. 56 and s. 57 of Act 701 relied by Bank Islam do not operate retrospectively; (iii) s. 56 and s. 57 of Act 701 contravene the Federal Constitution, in particular Part IX, art. 74 and art. 8; (iv) the Shariah Issues are not appropriate for reference to and/or determination by SAC; (v) there is a potential conflict of interest on the part of SAC by reason that SAC is a body supervised and regulated by Bank Negara Malaysia (BNM) and BNM has been involved in many material aspects concerning the transactions between Tan Sri Khalid and Bank Islam; and (vi) parties are entitled to tender expert evidence on matters of Islamic law.

Issues

[7] In view of the above, the main issues to be decided by this court may be summarized as follows:

(a) whether there is any question arising before this court concerning a Shariah matter ("Shariah Issue");

(b) if the answer to 7(a) is in the affirmative, whether this court is estopped and/or *functus officio* from making any reference to SAC when the question was duly referred by my learned sister, Rohana Yusuf J ("estoppel issue");

(c) if the answer to 7(b) is in the negative, whether this court should refer the Shariah Issues pursuant to s. 56 of Act 701 or s. 16B(8) of the repealed Central Bank Act, 1958 ("the Repealed CBA") ("applicable law"); and

(d) whether s. 56 and s. 57 of Act 701 contravene the Federal Constitution ("Constitutionality of s. 56 and s. 57 of Act 701").

A **Findings Of The Court**

Shariah Issue

[8] In this instant case, it was not in dispute that these consolidated actions arise from the BBA Facility, an Islamic financing facility, which was granted to Tan Sri Khalid by virtue of the Master Revolving Al-Bai Bithaman Ajil Facility Agreement dated 30 April 2011 ("the Master BBA Facility Agreement").

[9] In order to achieve the objective of the facility as set out in Item 3 of Schedule 1 of the Master BBA Facility Agreement, the parties have intended to bind themselves by the Shariah principles of Al-Bai Bithaman Ajil. This has been expounded in several provisions in the Master BBA Agreement such as the following:

(i) Clause D

In accordance with the bank's procedures under the Syariah principle of Al-Bai Bithaman Ajil, the customer agrees to sell to the bank and the bank agrees to purchase from the customer the asset at the times hereinafter stated and upon the terms and subject to the conditions hereinafter contained for the purpose of the bank immediately thereafter selling the asset to the customer upon deferred payment terms;

(ii) Clause E

"Further and pursuant to the principle of Al-Bai Bithaman Ajil, the bank agrees to sell to the customer and the customer agrees to purchase from the bank the asset, at the times hereinafter stated, on deferred payment terms and upon the terms and subject to the conditions hereinafter contained";

(iii) Clause 9.21

"It is hereby agreed and declared that the transactions in respect of the asset as provided herein are not in any manner whatsoever intended to contravene any applicable companies legislations or regulations particularly those in respect of restrictions on the transfer of shares, but are entered into solely for the purpose of complying with the Syariah principle of Al-Bai Bithaman Ajil."

[10] It was pleaded by Tan Sri Khalid that, *inter alia,* he was dissatisfied with the conduct of Bank Islam in connection with the BBA Facility which he believes tantamount to contravention to the religion of Islam and by way of this action, Tan Sri Khalid is now seeking, *inter alia*, a declaration that the BBA Agreements entered into by both parties were null and void. A B

[11] According to him, the transaction contemplated under the BBA Facility was not one that could be considered to be a "true Al Bai Bithaman Ajil transaction". It was instead, a simple loan agreement. Thus, the profit element was in fact an interest element which was not approved by the religion of Islam. C

[12] The BBA Facility executed between Tan Sri Khalid and Bank Islam was based on the Shariah contract of bai al-inah. Scholars gave different definitions to bai al-inah contracts due to their different opinions regarding its forms. The most famous definition given to it by classical scholars was: "A situation whereby a person sells a commodity to another for a specific price with payment delayed until a fixed date, and then buys back from him at a lower price by cash". However, Al Mawsu'ah Al-Fiqhiyyah (The Juristic Encyclopedia) defines it on the basis of the essence of engaging in it: that it is "a loan in the form of a sale in order to make the increase appear lawful". (See *Islamic Financial System-Principles & Operations*, ISRA, p. 221). D E

[13] The application of bai' al-inah is still regarded as a matter of juristic disagreement amongst the Shariah scholars. Some countries would espouse the views taken by the denouncers of Inah and the others preferably adopted the proponents' view on Inah. (See the discussion on bai al-inah in *CIMB Islamic Bank Bhd v. LCL Corporation Bhd & Anor* [2011] 7 CLJ 594]. F G

[14] Bank Islam, on the other hand, denied such allegations and pleaded, *inter alia*, that under Civil Law and Syariah principles, parties are bound by their agreements (*aufu bil uqud*) and Tan Sri Khalid is bound by the clear terms of the BBA Facility Agreements he had duly executed. H

[15] Looking at the above arguments, to my mind, there is no doubt that the allegations put forward by Tan Sri Khalid and the defence advanced by Bank Islam speak for themselves that there were Shariah Issues to be decided by this court. I

[16] Concerning Question (i), there was evidence to show that Tan Sri Khalid had executed seven sets of Asset Purchase Agreements ("APA") and Asset Sale Agreements ("ASA") at six monthly intervals:

(a) APA and ASA both dated 30 April 2001;

(b) APA and ASA both dated 31 December 2001;

(c) APA and ASA both dated 1 July 2002;

(d) APA and ASA both dated 1 January 2003;

(e) APA and ASA both dated 30 June 2003;

(f) APA and ASA both dated 30 December 2003; and

(g) APA and ASA both dated 30 June 2004.

[17] Based on the above facts, the Shariah Issue for ascertainment of SAC is whether the transaction had been executed according to the religion of Islam and the conditions stipulated by Bank Negara Malaysia (Bank Negara Malaysia Shariah Advisory Council Resolution No. BNM/RH/CIR 007-19) ("the BNM Circular") in particular. The relevant conditions to the issue are as follows:

(a) The BBA contract which is based on bai al-inah contract shall consist of two clear and separate sale and purchase contract which are purchase contract and sale contract; and

(b) The first sale and purchase contract shall be executed first before the second sale contract is executed. The purpose is to avoid the issue of selling an asset which is yet to be owned.

[18] Concerning Question (ii), Bank Islam alleged that Tan Sri Khalid had defaulted the terms of the BBA Facility Agreements. The Shariah issue for ascertainment by SAC is simply this: whether Bank Islam is allowed to dispose off the shares pledged by Tan Sri Khalid as security under the said agreements without his permission.

[19] Concerning Question (iii), the Shariah Issue for ascertainment by SAC is that in the event the BBA Facility Agreements are found to be contrary to the principles of Shariah, would Tan Sri Khalid's obligation to settle his indebtedness, if any, to Bank Islam be extinguished.

[20] Concerning Question (iv), the court would like SAC to confirm whether it is the opinion of the Shafie Madzhab that there must be two distinct and separate contracts/transactions between the first and the second sale in bai al-inah transactions and if so, whether such opinion has been violated in this circumstances of the case. As the court understands it, based on the Shariah principles, all transactions/ agreements in Islamic facilities shall be treated as district, separate and independent contracts/transactions between the first and the second sales.

[21] Concerning Question (v), it was alleged by Tan Sri Khalid that the Revolving BBA as executed by him and Bank Islam seems to be a multiple contracts on the same subject matter of sale and purchase which was the Kumpulan Guthrie Berhad shares. It is trite that based on Shariah principles of Islamic law of contract, the original BBA (not Revolving BBA) itself shall be treated as a valid, enforceable and independent contract and it is a binding contract between parties. So, the Shariah Issue for ascertainment by SAC is this: whether in the circumstances of this case, the Kumpulan Guthrie Berhad shares which was already sold, could be purchased back and resold again.

[22] I am satisfied that the parties are truly concerned about the principles of Shariah on which the agreements are founded. The parties had intended to bind themselves by the Shariah principles at the time the agreements were executed by expounding several provisions to the effect in the Master BBA Facility Agreement as referred to earlier.

[23] Looking at the purpose of s. 56 of Act 707, it is clear that SAC is required to ascertain the applicable Islamic law to the above Shariah Issues. Upon ascertainment of the Islamic Law, the court would then apply it to the facts of the present case. This approach is in consonance with the decision in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22, where Raus Sharif JCA (as he then was) stated:

> In this respect, it is our view that judges in civil courts should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise ...

A **Estoppel Issue**

[24] This is an interesting issue because this case has been presided by two judges: my learned sister Rohana Yusuf J and myself.

B **[25]** In the course of oral clarification of the written submissions for the Summary Judgment Application, Rohana Yusuf J, on 24 April 2009, had through the Deputy Registrar, referred the matter set out below to SAC pursuant to s. 16B(8) of the Repealed CBA when the issue and/or defence of illegality has
C been set up by Tan Sri Khalid:

> Saya diarahkan oleh Yang Arif Hakim Mahkamah Tinggi Dagang 4 Kuala Lumpur yang sedang mengendalikan satu kes melibatkan pertikaian mengenai kesahihan kontrak Bai Bithaman Aiil di bawah
D perbankan Islam.
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> 2. Berikutan dengan itu saya diarahkan untuk merujuk kepada Majlis Penasihat Syariah Bank Negara Malaysia di bawah Seksyen 16B(8), Akta Bank Negara Malaysia, 1958 (Pindaan 1994) **samada terdapat resolusi yang diluluskan oleh Majlis tersebut**
E **berkenaan kontrak Bai Bithaman Ajil**. (emphasis added).

[26] SAC replied on 27 April 2009 and under cover of its reply forwarded a copy of the BNM Circular.

[27] It was Tan Sri Khalid's stand that this court had duly
F exercised its discretion to refer the Shariah Issue on the alleged illegality to SAC as it had at the time. Therefore, this application should not be allowed for the second opinion.

[28] With respect, I am not inclined to agree with this argument.
G Bare reading and looking at exh. AKI-1 in totality make it clear that as far as the reference letter undersigned by learned Deputy Registrar dated 24 April 2009 is concerned, the same was not a reference to SAC for a new ruling on Shariah Issue. The letter did not address any specific issue to be decided by SAC.

H **[29]** In my considered view, what the letter intended for was to inquire if there was any existing resolution passed by SAC in respect of BBA contract. The BNM Circular was not issued because of the dispute between the parties before the Court. It
I was in fact an existing resolution which was issued before the dispute arose (see p. 122 of exh. AKI-2). Since Rohana Yusuf J had allowed the summary judgment application and the same had been duly overruled by the Court of Appeal on 3 March 2010 in

view of the conflict of opinion of the experts, the trial of the matter is still open and this court is at liberty to refer the Shariah issue to SAC. The next question is: under which provision should this court proceed upon?

Applicable Law

[30] It was submitted on behalf of Tan Sri Khalid that the BBA Facility was executed on 30 April 2001 and that both the consolidated suits were filed in May 2007. Act 701 only came into force on 25 November 2009, subsequent to the filing of the suits. Therefore, s. 56 and s. 57 of Act 701 could not be applied retrospectively.

[31] Reliance had been placed on the authorities such as *Yew Bon Tew v. Kenderaan Bas Mara* [1983] AC 553, *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529, *Lee Chow Meng v. Public Prosecutor* [1978] 1 LNS 88, *Goopan Govindasamy v. A Subramaniam & Anor* [1980] 1 LNS 22 where learned counsel for Tan Sri Khalid concluded that in view of the fact that the application of s. 56 and s. 57 of Act 701 would affect Tan Sri Khalid's vested rights to lead expert evidence, to have the issue of Islamic law determined by the court as the final arbiter of the subject and to challenge the determination by SAC on appeal bearing in mind the binding status of SAC ruling even on the Court of Appeal and the Federal Court, s. 56 and s. 57 of Act 701 could not be applied retrospectively to the case at hand.

[32] I am sure that Tan Sri Khalid must have felt extremely uncomfortable and apprehensive for the implementation of Act 701 in particular s. 56 and s. 57 which supersede the Repealed CBA. This is because, prior 25 November 2009, it was the Repealed CBA that was applicable. Relying on s. 16B(8) of the Repealed CBA, if there was any question concerning a Shariah matter in any proceedings before the court, the court may take into consideration any written directive issued by BNM or the court may refer such question to SAC, the ruling of which shall be taken into consideration by the court in arriving at its decision. However, the said position has changed since the introduction of Act 701 which came into effect on 25 November 2009. The non-binding effect under s. 16(B)(8) of the Repealed CBA had been taken away should a ruling have been passed by SAC upon a reference by a court under s. 56(1)(b).

[33] It is necessary at this stage to refer to s. 16B(8) of the Repealed CBA. The section reads as follows:

> (8) Where in any proceedings relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah principles and is supervised and regulated by the Bank before any court or arbitrator any question arises concerning a Syariah matter, the court or the arbitrator, as the case may be, may:
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> (a) take into consideration any written directives issued by the Bank pursuant to subsection (7); or
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> (b) refer such question to the Syariah Advisory Council for its ruling.

[34] Tan Sri Khalid argued that the decision of *Alias*'s case is not clear as to whether ss. 56 and 57 of Act 701 could be applied retrospectively. The court made reference to the decision of the Court of Appeal in *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617 where Richard Malanjum JCA had this to say at pp. 625-627:

> [w]e find that the argument advanced for the respondents is premised on at least two assumptions. Firstly, that the date in a sale and purchase agreement is material in determining the jurisdiction of the Tribunal. Secondly, any award given for a breach of a sale and purchase agreement entered into prior to the appointed date, particularly where the breach was before that date, would tantamount to allowing criminal law to operate retrospectively since it is now punishable being an offence for any failure to comply with or satisfy such award. This argument of course relates to the legal principle that criminal law cannot be made to operate retrospectively unless specifically stipulated. (see: *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645).
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> With respect, we find the first assumption to be without any basis. There is nothing in the provisions establishing the Tribunal or related thereto which can be said to support it. In our view while s. 16M sets out the general jurisdiction of the Tribunal, it is s. 16N and in particular sub-s. 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal.
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> ...
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> Sub-section 16N(2) does not stipulate a cut off point by reference to date of agreement *vis-a-vis* jurisdiction. All that is required of the Tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of sub-s. 16N(2) ...

> We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators. That was echoed in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79 ...
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> To limit therefore the jurisdiction of the Tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the Tribunal which Parliament never intended to do so. It is absurd in our view to say that Parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which Parliament intended to address when it legislated for the establishment of the Tribunal ...

[35] On hindsight, with all humility, the court agrees that the language used in *Alias*'s case has imported confusion on the true effect of the ruling on this issue. What the court intended to state was this: since there is no limitation imposed on SAC in the performance of its statutory duty in Act 701, ss. 56 and 57 could be applied retrospectively. This would fit into the analytical legal framework as expounded by the court in the judgment.

[36] In my judgment, s. 56 and s. 57 of Act 701 are procedural in nature. In this context, it would be apt to deal with as to what is procedural and what is substantive. *Law Commission of India*, 193rd Report had this to say:

> 'Procedural law' is one which deals with the procedure in Courts which has to be followed by the parties to seek vindication of their rights. The rights which they seek to vindicate in the Court through the said procedure are the substantive rights. We shall be elaborating these aspects in the succeeding chapters. A procedural law whenever made, applies to all pending proceedings unless its application is restricted to apply prospectively. On the other hand, a substantive law is always prospective in its application unless the legislature gives it retrospective effect. While it is a general principle of law no statute shall be construed so as to have retrospective effect unless its language is such plainly to require such a construction, that principle has not been applied to procedural statutes. The reason is that while substantive rights

A vested in persons cannot be interfered with by legislation except by clear language or by necessary implication, the position with regard to procedural law, is different. This is because nobody can have a vested right in any particular form much less in an older form of procedure.

B **[37]** There is presumption that amendments to purely procedural statutes are to be given retrospective effect and amendments that change substantial rights be given prospective effects. The common law rule which operates in the absence of an express or implied statutory provision to the contrary, is that amendments to C statutes which are purely procedural are to be given retrospective effect, and amendments to legislation that affect substantive rights are to be given prospective effect. (see *Maxwell v. Murphy* [1957] HCA 7; [1957] 96 CLR 261; *Newell v. The King* [1936] HCA 50; [1936] 55 CLR 707].

D **[38]** The court is aware that although it has often been said that the presumption against statutory retrospective does not apply to procedural provisions, the realization has grown that the distinction between procedural and substantive provisions cannot always be E decisive in the context of statutory interpretation. Thus, in *Yew Boon Tew v. Kenderaan Bas Mara (supra)*, Lord Brightman said:

> A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to F events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> G But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg, because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another H aspect of the same case (eg, because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

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And at p. 839 d to f:

> whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive ... Their Lordships consider that the proper approach to the construction of ... [an Act] ... is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.

[39] In similar vein, in *L'Office Cherifien des phosphates v. Yamashita-Shinnihon Steamhip Co Ltd* [1994] 1 AC 486, 586F, Lord Mustill said:

> Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value in diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.

[40] In the light of above, it does not follow that once an amending statute is characterized as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon the existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply.

[41] In the case of *Curtis v. Johannesburg Municipality* 1906 TS 308, Innes CJ had this to say at p. 312:

> Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date

A of promulgation, and even though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective.

[See also *Keith Sellar v. Lee Kwang and Tennakon v. Lee Kwang* [1980] 1 LNS 36 (FC)]

B

[42] In the case of *Howard Smith Paper Mill Ltd et al v. The Queen* [1957] SCR 403, the Supreme Court of Canada considered new legislation which provided that a document (even an "inter-office memorandum") found in possession of an accused, were C admissible in evidence as *prima facie* evidence of anything recorded therein as having "done, said or agreed upon" by the accused, or by the agent with the accuser's authority. The court held that the legislation was applicable to events which had occurred before its commencement. Catwright J said at p. 476:

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> While [the new legislation] make a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it E deals with a matter of evidence only and in my opinion, the learned Trial Judge was right in holding that it applied to the trial of the charge before him.

[See also *Lim Sing Hiaw v. PP* [1964] 1 LNS 92; *Gerald Fernandez* F *v. Attorney-General, Malaysia* [1970] 1 LNS 27; and *Haw Tua Tau v. PP* [1978] 1 LNS 60]

[43] So too here. There would be no adverse implement of any pre-existing substantive right of Tan Sri Khalid. It would entail nothing more than the application of a new procedure as far as G Shariah issue is concerned; the only difference is that as from 25 November 2009, the discretionary power of the court to take into consideration any written directive issued by BNM or the court may refer such question to SAC where there was any question concerning a Shariah matter in any proceedings before H the court had been taken away and the ruling of SAC is binding on the court.

[44] To my mind, the proposition that Tan Sri Khalid has a vested right to lead expert evidence is untenable because SAC is I a statute-appointed expert. SAC has been tasked with ascertaining Islamic law for the purpose of Islamic financial business since the amendment to the Central Bank Malaysia Act, 1958 in 2003, well before this action was brought before the court.

Constitutionality Of s. 56 And s. 57 Of Act 701

[45] Coming to the next contention of Tan Sri Khalid, *viz*, that whether s. 56 and s. 57 of Act 701 contravene the Federal Constitution, the issue on the constitutionality of the said provisions had been fully ventilated and decided in previous decision of this court in *Alias*'s case. I do not wish to repeat the principles and to once more explain the reasoning behind the judgment. To recap, I had already concluded that:

(i) the High Courts will only have jurisdiction and power as long as it is conferred by Parliament under the federal law;

(ii) s. 56 and s. 57 of Act 701 are valid federal laws enacted by Parliament pursuant to Item 4(k) of the Federal List (List I) in the Ninth Schedule of the Federal Constitution;

(iii) should there any question concerning a Shariah matter, this court has to invoke s. 56 of Act 701;

(iv) SAC is not in a position to issue a new hukm syara', but only to find out which one of the available hukm is best applicable in Malaysia for the purpose of ascertaining the relevant Islamic law concerning the question posed to them.; and

(v) SAC cannot be said to perform a judicial or quasi-judicial function. The function of SAC is confined to the ascertainment of the Islamic Law on financial matter. The court still has to decide the ultimate issues which have been pleaded.

[46] Before I conclude, perhaps it would be useful for me to add a few words as to why civil courts may not be sufficiently equipped to deal with the issue whether a transaction under Islamic banking is in accordance to the religion of Islam or otherwise. Civil courts are not conversant with the rubrics of Fiqh Al-Muamalat which is a highly complex yet under-developed area of Islamic jurisprudence. In applying Islamic law to determine the parties' right under a contract, a civil judge had to conduct an extensive inquiry into Islamic law and make an independent determination of Shariah principles.

[47] Even since long time ago, the civil courts have experienced no small difficulty in ascertaining the Islamic law when Markby J made this following observation in *Khajah Husain 'Ali v. Shazadih Hazari Begum*, 12 WR, at p. 344-347:

A As I should point out presently, the means of discovering the Islamic law which this court possesses are so extremely limited that I am glad to avail myself of any mode of escaping a decision on any point connected therewith.

B **[48]** While examining the constraints faced by the Islamic financial services in relation to dispute resolution, Engku Rabiah Adawiah, a law lecturer and now a member of SAC observed:

In the case of disputes arising between an Islamic financial institution and its clients, they will have to refer the matter to the C civil or common law courts that have jurisdiction to hear the litigation. This may result in decisions that may not comply with the Shariah rules. This problem is further exacerbated by the non-existence of any substantive law on Islamic financial services and banking practices in such countries. In short, although the transactions entered by the parties may be Shariah compliant in D the first place, but upon enforcement of the contracts, the court may make orders and decisions that may sideline the Islamic legal principles.

[See *Engku Rabiah Adawiah bt Engku Ali*, "*Constraints and* E *Opportunities in Harmonization of Civil Law and Shariah in the Islamic Financial Services Industry*", [2008] 4 MLJ i at p. iii].

[49] Fakihah Azahari, a lawyer, in "*Islamic Banking: Perspective on Recent Case Development*", [2009] 1 MLJ xci at p. cxxvi had this to say:

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When considering issues on Shariah, it is essential for the person so entrusted with the task to be well versed in the knowledge of Shariah or at the very least seek the opinions and advice of those in possession of Shariah knowledge. It is indeed a great G responsibility that one undertakes in presenting Shariah issues and in the dispensation of decisions which should reflect an equitable solution. In Surah al-Nisa':59, Allah exhorts man to obey Him, His Messenger and those charged with authority. The people 'charged with authority' in the present context, are those who are recognised as experts and knowledgeable in Shariah including H issues on Islamic banking and finance.

From a perspective, the knowledge of Shariah and particularly Islamic financing is a combination of three main fields- Shariah jurisprudence, Islamic economics and philosophy. In Shariah jurisprudence, the study of legal maxims and the Islamic law of I evidence is of paramount importance in understanding Islamic financing. The realm of legal maxims and the Islamic law of evidence provide a methodology for resolving issues and disputes

and providing innovative solutions to any issue on Islamic financing. An understanding of economics in general with special reference to Islamic economics would enable practitioners to establish parameters of Islamic financing whenever the two worlds of conventional finance and Shariah principles clash. Philosophy takes into consideration the historical aspects of the journey and past experiences of the Islamic financing product or development so as to incorporate the best feature for the financing product.

[50] Islamic law is not codified. Historically, Islamic legal orthodoxy formed around those private scholars who distinguished themselves by education, dialectical skill, and popularity with students and the public who consulted them. Over the years, many schools of law emerged as student collected the lectures and legal opinions of influential jurists and eventually wrote commentaries upon them. With a sufficient number of disciples preserving and expanding the work of a particular jurist, that jurist's corpus of opinions and accompanying legal methodology became known as "madzhab" (literally, "path" or "road to go") - school of Islamic law. These madzhabs were the means by which the fiqh was produced, preserved and transmitted in Muslim societies. While there is an unanimous agreement over what constitutes sources of law in Islam (Qur'an, Sunnah, Qiyas and ijma'), differences exist in the level of comfort that jurists have when turning to the last two sources (Qiyas and Ijma'). These differences explain why different madzhab developed over the years, each contributing different interpretation of Shariah. (See generally Shaykh Muhammad al-Khudri [1981], *"Tarikh al-Tashri' al-Islami*", Beirut: Dar al-Fikri; Masud, Muhammad Khalid, Brinkley Morris Messick and David S. Powers (eds.) [1996], *"Islamic Interpretation: Mufti and Their Fatwas"*, (Cambridge, MA: Havvard University Press); Sir Abdul Rahim, *"The Principles of Islamic Jurisprudence According to The Hanafi, Maliki, Shafih & Hanbali Schools*", IIIrd Reprinted 2006, "Islamic Financial System-Principles & Operations", ISRA, Chapter 5, Frank E Vogel, *"Islamic Law and Legal System: Studies of Saudi Arabia"*, (2000)].

[51] So, if the validity of a contract is challenged before a civil court, the critical questions to be asked are:

(a) to what source would a judge deciding to case refer;

(b) if there are conflicting opinions among madzhabs or Islamic jurists, which madzhab or Islamic jurists should he/she adopt; and

(c) if there is a conflict between Islamic Law and Civil Laws applicable to the matter, which law should take precedence?

[52] An example from the English cases illustrates this problem. This is the case of *Bank Shamil of Bahrain v. Beximco Phamaceutical Ltd & Others* [2004] All ER (D) 280. The dispute arises due to the default payment by the defendants and after the occurrence of various termination events under the agreements, the bank issued formal court proceedings and made an application to the court for summary judgment. As part of the term of the agreement, the parties decided that 'jurisdiction over any legal proceedings arising out of or in connection with this agreement' and parties' choice of law was stated in this following way:

> Subject to the principles of Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England.

[53] The main concern in this case is the difficulties imposed on the English Court where it was instructed by the parties to consider Islamic law principles. Mr Justice Morrison said:

> ... it cannot have been the intention of the parties that it would ask this secular court to determine principles of law derived from religious writings on matters of great controversy ...

[54] Thus, in order for the court to decide a Shariah law issue in this case, "it needs to have it's own view of the position under the Sharia'a law". However, the task will be difficult, if not impossible, for a secular court that lacks required knowledge to apply Islamic law, as Lord Justice Potter observed in his significant speech in the decision of Court of Appeal in the case, most of the classical Islamic law on financial transactions is not contained as "rules" or "law" in the Quran and Sunnah but is based on the divergent views held by established schools of law (madzhab) formed in a period roughly between 700 and 850 CE.

As a result, many of the commercial issues are still quite debatable as it is made up of "conflicting pronouncements". Consequently, the court held that is was "improbable in the extreme, that the parties were truly asking (the courts) to get into matters of Islamic religion and arthodoxy".

[55] In my considered opinion, it is advisable and practical that the question as to whether Islamic banking business is in accordance with the religion of Islam or otherwise be decided by eminent jurists properly qualified in Islamic jurisprudence and not

by judges of the civil courts. This is to avoid embarrassment to Islamic banking cases as a result of incoherent and anomalous legal judgments. The applicable law to Islamic banking has to be known with certainty. Otherwise, lawyers, bankers and their customers are left to wonder which is in fact the correct law.

[56] Even if expert evidence is allowed to be given in court to explain or clarify any point of law relating to Islamic banking, civil judges would be in a difficult situation to decide because the divergence of opinions among Islamic jurists and scholars to which the opposing experts might have and which they will urge the court to adopt may be so complex to enable civil judges to make an independent determination of Shariah principles.

[57] Thus, as has been expounded in *Alias*'s case, the necessity of a special body like SAC to ascertain the Islamic law most applicable in Malaysia especially in this Islamic banking industry is undeniable. Difference of opinion on Shariah issues relating to Islamic banking should be resolved within SAC.

[58] In the upshot, I allowed encl. 59 with costs in the cause.